

***United States Court of Appeals
for the Second Circuit***



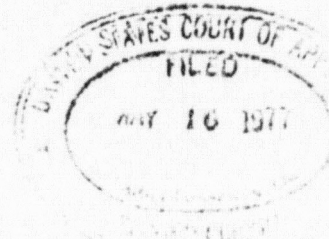
**APPELLANT'S
REPLY BRIEF**

77-6012

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT



SECURITIES AND EXCHANGE COMMISSION

Plaintiff-Appellee-Appellant

-against-

PARKLANE HOSIERY CO., INC.
HERBERT N. SOMEKH,

Defendants-Appellants-Appellees

ON APPEAL AND CROSS-APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

ANSWERING BRIEF FOR
PARKLANE HOSIERY CO., INC. AND HERBERT N. SOMEKH
ON THE CROSS-APPEAL

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-against-

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ANSWERING BRIEF FOR
PARKLANE HOSIERY CO., INC. AND HERBERT N. SOMEKH
ON THE CROSS-APPEAL

This brief is respectfully submitted on behalf of
defendants Parklane Hosiery Co., Inc. ("Parklane") and
Herbert N. Somekh ("Somekh") in answer to the Opening Brief
of plaintiff Securities and Exchange Commission ("SEC")
submitted in respect of its cross-appeal.* The cross-appeal

*This Court's April 4, 1977 Order directed defendants
and plaintiff to file their main briefs on their appeal and
cross-appeal, respectively, on April 29, 1977. The Order
directed also that answering briefs be filed on May 13, 1977.

is limited to so much of the denial of relief sought by the SEC below as denied an injunction against future violations of certain sections of the federal securities laws and related rules thereunder. The SEC did not appeal from the denial of other relief which it had sought below (SEC br. 15n.7)*.

Issue Presented

Where, in respect of a pre-merger proxy statement the District Court found, after trial, knowing violations of the federal securities laws in three respects, but also found that such violations were an isolated occurrence and that there was no reasonable likelihood of any recurrence of any such or other violations, did the District Court err in denying an injunction against future violations?

Statement of the Case

Parklane is the surviving corporation of an October 14, 1974 merger with New PLHC Corp. ("Newco"). By the merger, consummated pursuant to the laws of the State of New York,

*References to pages of the Appendix appear herein as "(A)"; references to pages of the SEC's main brief appear herein as "(SEC br.)"; references to pages of defendants' main brief submitted in respect of their appeal appear herein as "(Ds' br.)."

Parklane was returned to its status as a private company.* Somekh is the president and principal shareholder of Parklane (A506-507).

In November, 1974, the SEC commenced a private investigation of the merger which it carried on over a period of approximately one and one-half years (A451). Finally, in May, 1976, the SEC commenced the action below by the filing of a complaint (A580). Simultaneously, the SEC moved by order to show cause for the same injunctive and ancillary relief sought in the complaint (A5). Defendants thereupon moved, pursuant to Rule 12(b)(6), Fed. R. Civ. P., for an order dismissing the complaint on the ground that it failed to state a claim upon which relief can be granted.

Without deciding either motion, the District Court (Duffy, J.), directed that a hearing be held. At its inception, the SEC moved to consolidate the hearing with a trial on the merits (A36). The hearing was held on June 2, 3, 4 and 7, 1976. Upon its conclusion, defendants concurred in the SEC's motion to consolidate (A5).

Neither the complaint nor the SEC's motion challenged the validity of the merger or the fact that Parklane, by the merger, became a private company (A8). Rather, the

*The relevant facts in respect of the merger are set forth in defendants' main brief (pp. 10-12).

complaint charged that, in three respects, the Parklane proxy statement, dated September 24, 1974 (the "Proxy Statement") (A504), either contained misrepresentations or omitted to state facts necessary to make statements therein not misleading (A580).

Five months after the conclusion of the trial, the District Court, on November 9, 1976, rendered an Opinion and Order (the "Opinion") (A4) in which it found the Proxy Statement deficient in the following three respects:

First, the complaint claimed, and the District Court found, that the Proxy Statement did not disclose the purpose for the merger, though the purpose for the merger was irrelevant, as a matter of law, and, in any event, was adequately disclosed. While the District Court found non-disclosure in this regard, it did not find such non-disclosure to be material.

Second, the SEC claimed, and the District Court found, that the Proxy Statement should have been amended to disclose a meeting concerning the cancellation of a certain lease between the Federal Reserve Bank of New York ("FRB"), as lessor, and Parklane, as lessee, of certain

store premises, though on the basis of that meeting and a related subsequent telephone conversation, Parklane had no reasonable grounds for believing that any agreement would be reached for cancellation of the lease and, as a matter of law, no such amendment of the Proxy Statement was necessary.

Third, the SEC claimed that two independent appraisals of Parklane's common stock were disclosed in the Proxy Statement allegedly without disclosing that the appraisers were not provided sufficient information. At trial, the SEC sought to prove the claim in respect of one, but not the other, appraiser. The District Court found that the one appraiser was unaware of three items of information, though, as will hereinafter be seen, the record shows that in respect of such items the appraiser was not unaware of any fact which he deemed relevant.

In its Opinion, the District Court found only that § 14(a) of the Securities Exchange Act of 1934 (the "1934 Act") and Rule 14a-9 thereunder had been violated (A26).*

*Only in the preamble to the Judgment did the District Court, at the instance of the SEC, provide that there were knowing violations of §§ 10(b) and 13(a) of the 1934 Act and § 17(a) of the Securities Act of 1933 and certain rules thereunder (Ds' br. 60).

It also found that the violations were an isolated occurrence and denied an injunction against future violations. Thus, the District Court wrote:

"Turning to the request for an injunction against future violations, the 'critical question' is whether 'there is a reasonable likelihood that the wrong will be repeated.' SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1100 (2d Cir. 1972). While 'the commission of past illegal conduct is highly suggestive of the likelihood of future violations,' the 'totality of circumstance' must be examined. SEC v. Management Dynamics, 515 F.2d at 807. Herbert Somekh is not a securities broker or dealer. Apart from his role in Parklane, his involvement with the securities market has been as an investor. While I do believe his violation of Section 14(a) and that of his company were knowing thus meeting the statutory requirements, I also feel that it was an isolated occurrence. No one has suggested to me that there was any impropriety connected with the 1968 public offering or any other securities transaction in which Somekh or Parklane were involved. An injunction is intended to prevent further violations and not to punish for those that have already occurred. SEC v. Geon Industries, Inc., 531 F.2d at 56. Accordingly, I see no need for an injunction against future violations as to Somekh." (A25-26)

Judgment was not entered by the District Court until, upon defendants' motion, opposed by the SEC, this Court, in an Order dated February 8, 1977, directed that a judgment be entered pursuant to Rule 58, Fed. R. Civ. P. Judgment was then first entered by the District Court on March 9, 1977. Thereafter, upon the request of the SEC the Judgment was amended nunc pro tunc by an Order entered March 24, 1977 (A33).

As amended, the Judgment recited that all relief sought was denied other than a direction by the District Court that amendments be filed with the SEC to all public filings made or caused to be made by defendants since in or about September, 1974, and that such amendments reflect, "among other things," the three respects in which the District Court found the Proxy Statement deficient (A30-32).

Defendants have appealed (a) from so much of the Judgment below as directed them to file amendments to public filings and (b) from the findings of fact and conclusions of law upon which such direction was based (A595). Upon their appeal, defendants, in their main brief, demonstrated that the District Court had erred, as a matter of fact and law, in finding that the Proxy Statement was deficient in any respect or that there had been any violation of the federal securities laws. The relevant facts are fully set forth at pages 9-42 of defendants' main brief to which the Court's attention is respectfully invited. Only so much of those facts will be referred to herein as is necessary to show that the District Court correctly denied the injunction the SEC sought.

As will hereinafter be seen, the SEC's main brief, addressed to the District Court's denial of an injunction against future violations, attempts to overturn such denial on the basis of a partial presentation of the record and a liberal use of inflammatory characterizations which the

record does not justify or support. Thus, the SEC, in its brief, has chosen to rely almost exclusively upon its editorialized version of certain of the direct testimony of its witnesses and to disregard their testimony upon cross-examination -- testimony which contradicts the facts the SEC's brief presents and the impression of wrongdoing its brief seeks to create.

The purpose of this answering brief is not only to correct many of the errors of fact which appear in the SEC's brief, but also to show, as the District Court found, that this is certainly not a case where the injunctive relief sought would be proper.

A. The factual errors in the SEC's brief as to the purpose for the merger and its claimed non-disclosure

The SEC's brief erroneously assumes that, where, as here, the minority shareholders, upon the consummation of a merger, will not retain any interest in the surviving corporation, the purpose for the merger is a relevant consideration under the federal securities laws.* Upon the

*Mr. Justice Stevens, in his concurring opinion, in Santa Fe Industries, Inc. v. Green, ___ U.S. ___, 45 U.S.L.W. 4317, 4322n.2 (March 23, 1977), wrote:

"The motivation for the merger is a matter of indifference to the minority shareholders because they retain no interest in the corporation after the merger is consummated."

See also, Lessler v. Dominion Textile Limited, 411 F. Supp. 40, 42 (S.D.N.Y. 1975).

basis of such an erroneous assumption, the SEC's brief contends that the purpose for the Parklane merger was to enable Somekh to repay a personal indebtedness and that such purpose should have been, but was not, disclosed in the Proxy Statement (SEC br. 14).

However, even if such were the purpose for the merger, as the SEC contends, and even if it were a relevant consideration under the federal securities laws, the purpose was adequately disclosed in the Proxy Statement.* The Proxy Statement unmistakably disclosed that, if the merger were consummated, the minority shareholders could not, under any circumstances, have any interest whatsoever in the use that might be made of the assets of the surviving corporation -- whatever that use might be. This is precisely what the Proxy Statement disclosed to Parklane's minority shareholders in the following crystal clear language:

*The District Court did not consider whether, but simply assumed that, the purpose for the merger was relevant and found that the Proxy Statement had not disclosed that "the overriding purpose for the merger was to enable Somekh to repay his personal indebtedness" (A13). The fact that there was no failure of disclosure and that, in any event, the purpose for the merger was irrelevant is shown herein at pages 9-12 and at pages 12-14 and 42-45 of defendants' main brief. Furthermore, while the Opinion below states that materiality is a "separate question" from a finding of a non-disclosure (A13), the District Court made no finding that the purpose for the merger here was material. Nevertheless, defendants' main brief (pp. 46-50) undertook to, and did, show that, as a matter of law, the non-disclosure the District Court found was immaterial.

"If the proposed merger is consummated, the shareholders of Newco will be entitled to the benefit of all of the assets, earnings, earning capacity and cash flow of the Company [Parklane]." (A507) (emphasis added)

The disclosure thus made is unequivocal. The purported challenge of the SEC to it is devoid of any merit. The SEC merely makes the empty claim that the statement of disclosure is "ambiguous" without even the slightest attempt to support its untenable characterization (SEC br. 8).

Indeed, the Proxy Statement also disclosed to the minority shareholders that certain post-merger real estate transactions between Parklane and Somekh were contemplated. Thus, the Proxy Statement, disclosing Somekh's personal interest in those transactions, stated:

"The merger will make possible a combination of the resources of the Company with those of Mr. Somekh (who with his wife and trusts for the benefit of his children, owns approximately 86% of the stock of Newco) for the conduct of real estate activities of the type that Mr. Somekh has to date conducted individually (primarily development of garden apartments). Such a combination is presently being contemplated." (A507) (emphasis added)

The disclosures thus made in the Proxy Statement as to the purpose for the merger, at the very least, render

meaningless the SEC's diversionary discourse as to the three bank loans which the SEC's brief claims precipitated the merger. Even in this regard the SEC's brief is plainly lacking in simple candor. It perpetuates the erroneous assumption the SEC made in bringing this action, namely, that the purpose of returning Parklane to its status as a private company was to enable Somekh to avoid "financial oblivion" -- an assumption which the record negates (Ds' br. 14-20).

There was no reason for the SEC to have made such an erroneous assumption. It was born of an obvious failure of the SEC's investigation. It is apparent that the SEC, during its investigation, failed to inquire into, and at trial attempted to avoid consideration of, the readily available and uncontroverted facts which establish that Somekh's assets far exceeded his personal indebtedness (Ds' br. 15-16).

The SEC ignored the uncontroverted facts that the Somekh assets in 1974, consisting of substantial cash, securities, jewelry, mortgages and real estate interests, had an aggregate value of more than \$4,000,000 (Ds' br. 15-16). Instead, the SEC, seizing upon the existence of three bank loans in which Somekh had an interest, argues that the purpose for the merger was to make possible repayment of those loans by the use of Parklane assets and that such purpose was not

disclosed (SEC's br. 4-7), notwithstanding the fact that the Proxy Statement did disclose not only (a) that if the merger were consummated the shareholders of the surviving company would be entitled to the benefit of all of its assets and cash flow to make whatever use of them they saw fit, but also (b) that certain post-merger real estate transactions were contemplated between Parklane and Somekh (A507).

Thus, upon the issuance of the Proxy Statement, the minority shareholders were clearly on notice of the fact that, if the merger were consummated, they would not retain any interest in the assets of Parklane regardless of the use which might be made of them. And they were also on notice of the fact that they would not have any interest in post-merger real estate transactions which the Proxy Statement disclosed were contemplated between Parklane and Somekh. It was in the full light of such information provided the minority shareholders in the Proxy Statement that the District Court, in its Opinion, wrote:

"[T]he sole question facing a minority shareholder was whether to accept the \$2.00 per share [offering] price or to pursue his rights as a dissenting shareholder in an appraisal proceeding". (A20)

Since the minority shareholders were aware that whatever use might be made of the assets and cash flow of Parklane after the merger could be of no significance to

them, the fact that those assets and cash flow might be used in connection with the post-merger purchase of real estate interests and repayment of the three bank loans could also be of no significance to them.

In reality, the attention which the SEC and the Court below have devoted to the three bank loans is beside the point. Clearly, Somekh's indebtedness in this regard had no more relevance in respect of the merger than did his far greater assets. It would have been no more relevant to have recited Somekh's indebtedness in the Proxy Statement, as suggested by the Court below (A13), than it would have been to have recited his far greater assets. However, since in seeking reversal of the denial of an injunction below, the SEC rests almost entirely upon the three bank loans, it has become necessary to show the respects in which its brief has erroneously treated the facts relating to them.

The three bank loans were a \$900,000 loan of Bankers Trust Company ("Bankers Trust") which was collateralized by more than twice the amount of the loan and in respect of which Somekh and his wife were co-obligors; a \$150,000 loan of National Bank of North America ("NBNA") which was a secured loan to a real estate partnership, known as 433 JV, in respect of which Somekh was but one of four guarantors; and a \$125,000 loan of First National City Bank ("FNCB") (Ds' br. 15-16).

1. The inaccurate statements
in the SEC's brief as to
the Bankers Trust loan

With respect to the largest of the three bank loans, namely, the Bankers Trust loan, the SEC has grossly exaggerated the facts disclosed in the record. For example, the SEC's brief (p. 6) states that Bankers Trust "continued to press for immediate payment of the loan." Bankers Trust did no such thing. Thomas E. Baggott, a vice president of Bankers Trust called by the SEC as its witness, refuted the SEC's statement. On cross-examination, Baggott testified:

"Q You never demanded immediate repayment, did you?

A No.

Q And you never stated to Mr. Somekh an amount, any specific amount by which you wanted his personal loan reduced, did you?

A Not a specific amount, no.

Q And you never gave him a specific time by which to reduce the loan?

A No, I wouldn't call it a specific time." (A272-273) (emphasis added)

Somekh's testimony was consistent with that of Baggott. Contrary to the SEC's brief (pp. 5-6), there was plainly no pressure on Somekh of the kind it attempts to portray. Thus, upon direct examination by the SEC, Somekh, in respect of a March 1974 meeting he had with Baggott and upon which the SEC relies (SEC br. 5-6), testified as follows:

"Q What was discussed?

* * *

A Mr. Baggott indicated that he would like for me to make some effort to make some paydown on the loan.

I suggested that maybe if Mr. Baggott really felt -- didn't want the loan, I would make other arrangements.

Mr. Baggott specifically said no, there was no need for me to make any other arrangements. All he would like for me to do was to make some effort liquidating some holdings and giving him some paydown." (A136-137)

Not only was there no pressure for immediate repayment of the Bankers Trust loan, but Baggott, knowing that Bankers Trust was more than fully secured, testified as follows:

"Q Now, sir, you recall having testified to a security package of Mr. and Mrs. Somekh's assets in respect of the personal loan?

A Yes.

Q That was the security package to which you looked in the event there was to be repayment of the loan, is that not so?

A Yes." (A285-286) (emphasis added)

In this same regard, Baggott, during the SEC investigation, had likewise testified as follows:

"We knew what our security package was and the availabilities and that was what we felt the repayment when, as and if, would com from." (A286)

The SEC's brief also attempts to create the further erroneous impression that Somekh in 1974 was not in a position to reduce the amount of the Bankers Trust loan.

Thus, the SEC's brief (p. 6) states:

"The real estate market had, however, become depressed and, as a result, no properties were sold and no payments were made on the personal loan before the decision to convert Parklane to a private company."

To the contrary, but for delay attributable to Bankers Trust, it would have received a payment of \$175,000 in reduction of its loan in or about April 1974. It was then that Somekh had informed Baggott of his arrangement to sell a mortgage note of the Rite-Aid company which he held (A542). The proceeds of \$175,000 from the sale were to be applied in reduction of the Bankers Trust loan (A68, 424).

The only reason that payment was delayed for some months after April 1974 was that, as Somekh testified, Bankers Trust had lost the note. Indeed, it took from April to December 1974 to convince Rite-Aid to cancel the note and substitute a new one in order to effectuate the sale (A205-206). In this regard, Baggott also, on cross-examination, testified:

"Q Do you know whether the documentation [regarding the Rite-Aid note] had been in the hands of Bankers Trust and misplaced at Bankers Trust?

A That was the general feeling. It was either misplaced at Bankers Trust or mishandled at the former bank.

Q Do you know how many months of delay that caused because of the absence of the necessary document?

A I don't recall exactly but it was a fair period of time." (A288)

The conclusion is clear. It was only happen-
stance, beyond Somekh's control, that payment of the \$175,000
proceeds from the sale of the Rite-Aid note was not made in
early 1974, but was delayed until after the merger -- a fact
which was obviously known to the SEC, but not mentioned in
its brief, and which negates the SEC's unworthy remark that
Somekh was merely "dangling the prospect" of selling some of
his assets to enable him to reduce the Bankers Trust loan
(SEC br. 6).*

*Another example of the SEC's editorializing of the
record also readily appears in its deprecating characteri-
zation of the Rite-Aid mortgage as one on a "drug store."
In contrast, Baggott, during his direct examination by the
SEC, had actually testified as follows:

"THE COURT: What is a Rite-Aid note?

THE WITNESS: The Rite-Aid happens to
be the name of a company, a large chain of
drug stores which he held from them a note,
a mortgage note, I believe, in connection
with the sale of property he had made to
them sometime before that. It was good
property in that Rite-Aid was a very
substantial organization." (A68)
(emphasis added)

Moreover, whatever repayment or reduction of the loan Bankers Trust might have desired, Bankers Trust could have effected on its own, without even so much as consulting Somekh. It could itself have sold the Rite-Aid mortgage note, which was included in its "security package", as well as any other part of the more than \$2,000,000 of collateral it held (A109, 285-286).

2. The inaccurate statements
in the SEC's brief as to
the NBNA loan

The SEC's brief is also seriously wanting in its recital of the facts concerning the \$150,000 NBNA loan. It states some, but not all, of the facts and discolours others. While the SEC's brief (p. 6) states that the loan was a secured loan to 433 JV, a real estate partnership in which Somekh was one of four partners, and that the loan "was personally guaranteed by Somekh," it fails to disclose that Somekh was but one of four guarantors (A330). The erroneous impression which the SEC thus attempts to create, contrary to the facts, is that Somekh was the sole guarantor of the loan and had the sole responsibility for it.

Moreover, in erroneously suggesting that by reason of the NBNA loan Somekh was pressured into taking Parklane private, the SEC overlooks the fact, admitted in its brief,

that, as an alternative to repayment, NBNA would have been satisfied to have the loan refinanced through a corporation to enable NBNA to realize a higher rate of interest. As the SEC's brief (p. 7) states:

"Alternatively, Tunick [of NBNA] suggested that the loan could be refinanced through a corporate vehicle, since this would allow the bank to charge a much higher rate of interest (A332-A333)."

What the SEC's brief fails to disclose is that, as its own witness had testified, the NBNA loan was in fact refinanced through a corporate vehicle (A334).

Finally, the SEC's brief (p. 13) improperly states that, after the merger, it was Somekh who "discharged the National Bank loan." To the contrary, the true fact is, as the record shows, Somekh had only to contribute \$50,000 towards payment of the \$150,000 principal amount of the loan (A236-237).

3. The inaccurate statement in the SEC's brief as to the FNCB loan

In the case of the \$125,000 loan from FNCB, the SEC's brief (p. 7) haphazardly asserts that "a third bank entered the chase for Somekh's limited assets." Thus, again the record was inaccurately presented. In the case of the Bankers Trust loan, Baggott testified that it was more than

fully collateralized and repayment was secured by the more than \$2,000,000 of collateral which it held. In the case of the NBNA loan, NBNA had itself proposed refinancing of its loan through a corporate vehicle to enable a higher rate of interest to be charged, and this was done. Furthermore, the uncontroverted evidence rejects the SEC's characterization of the Somekh assets as "limited." In 1974 the Somekh assets amounted to more than \$4,000,000 and far exceeded the amount of the three bank loans (Ds' br. 15-16).

It is respectfully submitted that in view of the kind of treatment which the SEC's brief has accorded the record, the SEC has itself discredited its attempt to impugn the truth of Somekh's denials at trial that returning Parklane to its private status was "'the only way'" he could repay his bank loans (SEC br. 19). Such an attempt to discredit Somekh is no more valid than the SEC's confected assertion that Parklane was returned to its private status to enable Somekh to avoid "financial oblivion."

4. The erroneous treatment which the SEC's brief attempts to accord post-merger transactions

The story which the SEC's brief has attempted to fashion based upon the three bank loans is all for naught.

It fails to support the claimed deficiency of disclosure of the purpose for the merger. That disclosure was adequately made. The Proxy Statement disclosed that "If the proposed merger is consummated, the shareholders of Newco will be entitled to the benefit of all of the assets, earnings, earning capacity and cash flow of the Company." (A507) (emphasis added) More than that, the Proxy Statement also disclosed the direct personal interest which it was contemplated Somekh would have in the assets of Parklane after the merger.

Consistent with the disclosures thus made in the Proxy Statement, the SEC's brief (p. 12) itself states that, in August and early September 1974, Somekh had told Baggott that "after the outside stockholders were eliminated, he could sell some of his properties to the new company." This information is the same information of which the minority shareholders were informed by Parklane in its Proxy Statement.

After the merger was consummated, Somekh did sell some of his properties to Parklane as the Proxy Statement had disclosed was contemplated (A507). The facts in this regard cannot be distorted to justify the SEC's inflammatory characterization of a "raid" on the Parklane treasury (SEC's br. 2, 12). As the record shows, the properties were independently appraised for Bankers Trust and Mass Mutual,

and Parklane, in purchasing those properties, received full and fair consideration (A230-231, 427-430, 485).

- B. The factual errors in the SEC's brief concerning the disclosure of the possible cancellation of the lease between the Federal Reserve Bank, on the one hand, and Parklane and its two subtenants, on the other hand

The second area in which the SEC has significantly departed from the record concerns the cancellation sought by the FRB of a lease of certain store premises between the FRB, as lessor, on the one hand, and Parklane, as lessee, and its two subtenants, on the other hand.* The store premises, located at the corner of John and Nassau Streets in the City of New York, had been leased by Parklane in or about 1961. The expiration date of the lease and the subleases is December 31, 1978 (A600).

Commencing in or about 1968, the FRB had sought cancellation of the lease in connection with a contemplated, but aborted, plan to construct an office building on the site of which the store premises were a part (Ds' br. 21-22). The question raised by the SEC was whether the Proxy Statement had properly disclosed the negotiations for cancellation of the

*The facts in this regard are fully set forth at pages 21-31 of defendants' main brief.

lease. As will hereinafter appear, full and fair disclosure was in fact made in this regard as well.

From in or about 1968 to the issuance of the Proxy Statement on September 24, 1974 there had been sporadic cancellation discussions which had come to naught (Ds' br. 21-25). Acknowledging that at the time of the Proxy Statement negotiations had ceased and that the Proxy Statement correctly reflected that fact, the SEC's brief (p. 10) states:

"On September 29 [sic], 1974, the time the proxy solicitation was originally prepared and filed with the Commission, the Nassau Street negotiations had apparently ceased and the proxy statement reflected that status (A519)." (emphasis added)

The District Court's Opinion is to the same effect (A16).

However, that Opinion and the SEC's brief, ignoring relevant facts, took the position that, after the Proxy Statement was issued, negotiations were resumed at a meeting on October 4, 1974 between Robert S. Curtiss, the FRB representative, and Somekh, and that the discussion at that meeting should have been disclosed in an amended proxy statement (A16; SEC br. 10-11). As will hereinafter appear, however, on the basis of that discussion there was nothing new to disclose and no reason for amendment of the the Proxy Statement.

Both the SEC's brief and the Opinion below relied solely upon a part of the direct testimony of Curtiss and

disregarded (a) the relevant portion of Curtiss' October 7, 1974 letter reporting to the FRB the October 4, 1974 meeting (A573), (b) a telephone conversation between Curtiss and Somekh within a week of the October 4, 1974 meeting (A347) and (c) the testimony Curtiss gave on cross-examination (A414-415).

As to the October 4, 1974 meeting, the SEC's brief has misstated the discussion which Curtiss and Somekh actually had. The SEC's brief (p. 10), on the basis of Curtiss' direct testimony alone, sets forth the following non-existent agreement:

"Curtiss stated that he would recommend to FRB a payment of \$1.2 million, and, in return, Somekh would get assurances from the sub-tenant and the franchisee to accept the amount settled upon by the two negotiators (A343)."

That statement is belied by (a) the contrary testimony of Curtiss on cross-examination, (b) Curtiss' October 7, 1974 letter to the FRB and (c) Somekh's testimony (A250-251, 254).

Contrary to the SEC's brief, the facts are that while Curtiss was to recommend to the FRB that it offer \$1,200,000 for cancellation of the Parklane lease and its subleases, Somekh had not agreed, in return, that he would get assurances from his subtenants to accept such a non-

existent offer. Rather, Curtiss and Somekh both understood that Somekh was to do nothing unless and until the FRB adopted Curtiss' recommendation and an offer was in fact made. Only then was Somekh to attempt to obtain the consent of the subtenants.

Thus, Curtiss, in his October 7, 1974 letter to the FRB, reporting what actually occurred at the October 4, 1974 meeting, wrote:

"Upon my advise [sic] to Mr. Somekh that \$1,200,000 will be paid he immediately will attempt to secure respective letters from Counsel for a vacating of the two occupied premises by a date certain upon payment of the amounts stated." (A573) (emphasis added)

Curtiss, at trial, confirmed the wholly conditional nature of the October 4, 1974 discussion (A414-415). Somekh corroborated the facts Curtiss' testimony established in this regard (A250-251). Thus, there is no basis for the SEC's assertion that, in respect of the October 4, 1974 meeting, Curtiss' testimony and that of Somekh were contradictory (SEC br. 20-21). The true fact is that Curtiss' testimony and the testimony of Somekh were entirely consistent.

Confirming the fact that Parklane was not to do anything in respect of its subtenants unless the FRB adopted Curtiss' recommendation and made an offer for cancellation of the lease, Somekh testified:

"Q Isn't it true, Mr. Somekh, that you told Mr. Curtis at that meeting that the Parklane lease can be cancelled upon payment by the Federal Reserve Bank of \$1,200,000?

A No, sir. I suggested --

Q Thank you, Mr. Somekh.

THE COURT: Let him answer. You suggested what?

THE WITNESS: I suggested that if the franchisee and the sub-tenant would hold to their price, and if he were to give me a concrete offer that I can go back to them with and they would agree, then a deal can be made. Other than that I had no authority to act on anybody's behalf.

Q Isn't it true, Mr. Somekh, that you stated to Mr. Curtis that you would try to obtain a time extension of your sub-tenant's acceptance of \$600,000?

A No, sir. That was only if he came back to me with a concrete offer.

Q Isn't it also true, Mr. Somekh, that you told Mr. Curtis at this meeting that Parklane would agree to accept \$300,000 out of the \$1,200,000 for cancellation of the lease?

A Provided he came with an offer, provided my sub-tenant and franchisee agreed to this offer that was not forthcoming.

Q Isn't it also a fact, Mr. Somekh, that you stated to Mr. Curtis that if the Federal Reserve Bank would offer \$1,200,000, that you would secure letters from your sub-tenants for a date certain for the vacating of the premises?

MR. PARKER: Objection as to form.

THE COURT: No, I will permit it. Go ahead.

A No, sir, no. Mr. Curtis was to come to me with a definite offer if the Federal Reserve were to authorize him to make such an offer, and if he had such an offer, then I was to go to my tenant and secure their approval." (A250-251)
(emphasis added)

Curtiss, in a telephone conversation which followed the October 4, 1974 meeting, confirmed that it would have been futile and useless for Somekh to have sought the consent of Parklane's subtenants to cancellation of their subleases. Somekh had no basis or reason for seeking any such consent. During Curtiss' direct examination, the Court stated the fact that, within the week following the October 4, 1974 meeting, Curtiss had a telephone conversation with Somekh, in which he informed Somekh that he had recommended the \$1,200,000 amount, but could not report that his recommendation had been adopted, or that it would ever be adopted, or that the FRB would ever make any offer. Rather, Curtiss informed Somekh that the FRB had price problems on the new building "to the extent they may not even build it." (A347)
(emphasis added)

Thus, the inexorable facts are that, from and after the October 4, 1974 meeting, (a) Curtiss' recommendation was never adopted by the FRB, (b) the FRB never made an offer for cancellation of the lease, (c) Somekh and his two subtenants never had any FRB offer to consider, (d) there was nothing

new to report at the October 14, 1974 Parklane shareholders' meeting and (e) there certainly was no reason to amend the Proxy Statement. Moreover, as Curtiss also testified:

"Q Mr. Curtiss, isn't it the fact that to this day you have never advised Mr. Somekh that the Federal Reserve would pay one million, two for the termination of the Parklane leasehold at 68-70 Nassau Street, isn't it?

A That is correct." (A403)

Thus, the disclosure in the Proxy Statement was true and accurate when it was issued on September 24, 1974 and it was true and accurate at the time of the October 14, 1974 Parklane shareholders' meeting. The Proxy Statement was punctiliously correct in disclosing that "there are no negotiations at present. The Company is unable to determine if another offer will be made." (A519) To have said, as did Somekh, in his post-merger October 29, 1974 letter to Baggott (A575), that there might be a deal was, at the most, utter speculation which never even approached reality.

It is respectfully submitted that for the SEC's brief (p. 22) to charge Somekh with "equivocation" as to the facts, while the SEC ignores the facts which establish that there was no need or reason whatsoever to amend the Proxy Statement, cannot be excused as merely zealous advocacy. Rather, the erroneous charge made is but another indication of the brief's unreliability.

C. The factual errors in the
SEC's brief concerning the
pre-merger appraisals of
the Parklane shares

In connection with the merger, Parklane had engaged two investment banking firms -- Thomson & McKinnon Auchincloss Kohlmeyer Inc. ("Thomson & McKinnon") and Foster Securities Corp. ("Foster Securities") -- to appraise the fair value of Parklane's shares (A508). Representatives of both firms had been interrogated under oath during the SEC's investigation (A604). In spite of the contrary testimony those appraisers then gave, the SEC's complaint erroneously concluded that the proxy materials contained

"Statements that Parklane had employed two appraisers to determine the fair value of Parklane stock, when in fact, the defendants failed to disclose in the proxy statement of Parklane that the two appraisers were not provided with sufficient information in order to prepare and provide a true and complete valuation of such stock." (A587)

At trial, the SEC retreated from those erroneous allegations. It made no attempt whatsoever to show that the Foster Securities appraisal, in any respect, was based upon inadequate information. Instead, the SEC mistakenly sought to prove that Thomson & McKinnon had been inadequately informed in respect of three purported items of information, though none of them had -- or could have had -- any bearing upon the appraisal made. Defendants' main brief (pp. 31-42,

57-59) demonstrates that none of the three purported items required disclosure as a matter of fact or law.

I

As to the first item of information which the SEC claims was not disclosed to Thomson & McKinnon, the SEC's brief (pp. 11-12) erroneously states that Thomson & McKinnon was not told that Somekh intended to sell some of his real estate holdings to Parklane and that had this fact been known to Thomson & McKinnon it would have affected the appraisal. The assertion thus made is less than candid in that it ignores the contrary testimony of Peter A. Russ of Thomson & McKinnon both at trial and at the time of his interrogation by the SEC during its investigation.

Upon cross-examination, Russ testified that he was, in fact, aware of the possible merger of some of Somekh's real estate operations into Parklane because Somekh himself had so informed Russ. As Russ testified:

"Q Sir, isn't it the fact that during the course of the work you were doing in respect of your appraisal that the subject of cash flow and real estate operations was mentioned to you, sir?

A Yes, it was mentioned.

Q Do you recall, sir, having been asked these questions and giving these answers when you were examined by the SEC in the course of its investigation, sir:

'Q What did he [Somekh] tell you, generally?

A He had some notions that if -- if he could develop -- if he could use the cash flow of Parklane, he might merge some of his real estate operations into the company after it went private.'

Do you recall saying that?

A I recall saying that, yes."
(A313-314)

Thus, the SEC's assertion (SEC br. 11-12) that Russ, at the time of the Thomson & McKinnon appraisal, was unaware of the possible sale by Somekh to Parklane of certain real estate interests is, at the very least, inaccurate.

The record also flatly negates the SEC's erroneous assertion that had Russ known, as in fact he did, of the possible sale by Somekh of some real estate interests to Parklane after the merger, it would have affected the appraisal (SEC br. 11-12). In this regard, Russ, during the SEC investigation, had testified that the contemplated sale of real estate had no bearing upon the appraisal rendered. The question put to Russ by the SEC and the answer he gave were as follows:

"Q Did this have any bearing upon your opinion letter?

A No." (A616)

Thus, the claim made by the SEC that Russ was unaware of the possible sale of such real estate interests to Parklane and that it would have affected the appraisal is contrary to the facts.

II

The second purported item of information which the SEC claims was not disclosed to Russ is based upon his negative answer to the hypothetical question, permitted over objection, whether he knew, at the time of his appraisal, "that approximately \$1 million in corporate assets were to be used by Mr. Somekh to reduce his personal indebtedness" (SEC br. 22).

Russ' negative answer to such a question cannot support the SEC's claim that any such information existed, and, hence, that any such information was withheld. As defendants' main brief has shown (pp. 36-38), the hypothetical question was not based upon any fact established in the record and the SEC's brief does not claim that it was. At the time of the Thomson & McKinnon appraisal no such fact existed, and, accordingly, no such information could have been imparted to Russ.

Thus, the reason for Russ' negative answer to the

hypothetical question is obvious. Russ' testimony that he did not know of a purported, but unproven, fact could have no significance. Nor was there anything in the record to support the implication of the hypothetical question that Somekh was to receive the assumed amount of approximately \$1 million of corporate assets without furnishing full consideration therefor. All the record shows is that, at the time of the Thomson & McKinnon appraisal, a combination of some of Somekh's real estate activities with Parklane's resources was contemplated -- a fact of which Russ testified he was aware (A313-314).

III

The third purported item of information which the SEC's brief claims was withheld from Thomson & McKinnon concerns the status of the discussions as to the possible cancellation of the FRB-Parklane lease. In this regard, the SEC's brief (p. 12) states:

"Moreover, the appraiser was not told about the negotiations for the cancellation of the leasehold, or the fact that Parklane could net \$300,000 from those negotiations (A304-A310). Had the appraiser known this fact, it too, would have affected his appraisal (A310)."

These statements represent still another error by

the SEC in its pursuit of an injunction. The SEC's own brief establishes that, at the time of the Thomson & McKinnon appraisal in August 1974, cancellation of the FRB-Parklane lease was a dead letter (SEC br. 9-10). Thomson & McKinnon had been engaged to make its appraisal of the Parklane shares on August 12, 1974 and delivered it to Parklane as of August 29, 1974 (A303) -- a period during which there was nothing to consider insofar as the FRB-Parklane lease was concerned.

The SEC's brief itself concedes that between July and September 1974, when the Proxy Statement was issued, there was no offer for cancellation outstanding and negotiations had ceased. Thus, contradicting the SEC's own contention that Thomson & McKinnon should have been informed of the FRB-Parklane negotiations, the SEC's brief (pp. 9-10) states:

"Accordingly, on June 27, 1974, Parklane made a counter-offer of \$1.2 million for the cancellation of the leasehold (A245). Although there was correspondence between Somekh and Curtiss about the counter-offer during July [1974], it expired without any action (A392).

"On September 29[sic], 1974, the time the proxy solicitation was originally prepared and filed with the Commission, the Nassau Street negotiations had apparently ceased and the proxy statement reflected that status." (emphasis added)

Clearly, when the Thomson & McKinnon appraisal was made in August 1974, (a) there were no negotiations for cancellation of the FRB-Parklane lease, (b) there was no offer for such cancellation, (c) there was no reason to believe that Parklane might realize a single dollar, much less \$300,000, for cancellation of the lease and (d) there was nothing to withhold from Russ or for Russ to be aware of insofar as the FRB-Parklane lease was concerned.*

Thus, the statement in the SEC's brief that had the Thomson & McKinnon appraiser known of the negotiations it would have affected his appraisal is flatly contradicted by Russ' testimony. At the very inception of his cross-examination, Russ testified as follows:

"Q Mr. Russ, if the prospect of the realization of \$300,000 that Mr. Ormsten [of the SEC] referred to was conjecture, would that have made a difference as against the likelihood of it having happened?

A Yes.

Q What would that difference be, sir?

*The untenable nature of the SEC's claim that any information was withheld from Thomson & McKinnon in respect of the FRB-Parklane lease is underscored by the testimony of the Foster Securities appraiser. The Foster Securities appraisal was made and submitted during the same time as the Thomson & McKinnon appraisal. The Foster Securities appraiser testified that he was aware that, in August 1974, there were no negotiations for cancellation of the FRB-Parklane lease so that there was nothing for him to take into account in his appraisal (Ds' br. 40-41).

A The difference was that I, specifically, and my firm had given me guidelines to try to deal with as many of the events as we could reasonably predict. We tried to stick to that parochial view.

We were evaluating events we could predict and conjecture and speculation about either external events or even internal events that we could not put a firm reason to expect it to occur, we did not evaluate." (A311-312) (emphasis added)

Accordingly, once again the SEC's brief has presented a truncated version of the record to create an impression which the facts do not support.

POINT I

The District Court properly denied the injunction sought against future violations.

While the District Court found that defendants violated the federal securities laws (A26,30), it denied the injunction against future violations since it found that the violations were an "isolated occurrence;" that there was no reasonable likelihood of recurrence; and that there was no suggestion of any impropriety in respect of any other securities transactions in which either Somekh or Parklane was involved (A26).

The SEC's brief (p. 22) mistakenly contends that Somekh's record is one of "equivocation and denial", and, on

that basis, seeks to create the inference of a reasonable likelihood of future violations of the federal securities laws. Such a conclusion by the SEC, however, was reached, as has been seen, on the basis of a brief not only marked by many factual inaccuracies, but which closes its eyes to many relevant facts, especially those established upon the cross-examination of the SEC's own witnesses and during the course of the SEC's own investigation. For those reasons alone, the SEC's contention has no value.

In any event, the very Proxy Statement the SEC has attempted to challenge manifests an intent to disclose and negates any inference of a likelihood of future violations. Thus, the Proxy Statement informed the minority shareholders that the merger was to be effected pursuant to the laws of the State of New York; that those laws provided certain rights to dissenting shareholders and, in detail, what those rights were (A516); that the purpose for the merger was to return Parklane to its status as a private company and that Newco was formed for that purpose (A506).

The Proxy Statement also put the minority shareholders on notice of the fact that, upon the merger, they would not retain any interest in the surviving corporation; that the majority shareholders would own 100% of Parklane; and that the majority shareholders would "be entitled to the benefit of all of the assets, earnings, earning capacity and

cash flow of the Company" (A507). It was thus clear that the use to which those assets might be put after the merger could be of concern only to the majority, and not the minority, shareholders. In a similar case, the Court indicated that such disclosures were entirely lawful and proper.

Lessler v. Dominion Textile Limited, 411 F. Supp. 40, 42 (S.D.N.Y. 1975). Accord: Santa Fe Industries, Inc. v. Green, supra.

As to the status of the FRB-Parklane lease cancellation discussions, the SEC's brief (pp. 9-10) expressly acknowledges that they were accurately disclosed in the Proxy Statement when issued (p. 23, supra). And, as has been seen, the October 4, 1974 meeting between Curtiss and Somekh and their subsequent telephone conversation confirmed the accuracy of the disclosures made in the Proxy Statement and the fact that Parklane had no reasonable grounds for believing that there would be any offer made by the FRB for a cancellation of the lease or any need or reason to amend the Proxy Statement (pp. 23-28, supra).

As to the claim that Russ of Thomson & McKinnon, one of the two independent appraisers, was unaware of any relevant or material information, the situation is the same. There was no lack of disclosure to Russ.

As Russ testified, he was aware of the possibility of post-merger real estate transactions between Parklane and Somekh (A313-314) and saw no reason for taking it into account in his appraisal. With respect to the possible cancellation of the FRB-Parklane lease, the SEC's brief (pp. 9-10) itself concedes that, at the time of the Thomson & McKinnon appraisal, the negotiations had ceased so that there was no information to impart to Thomson & McKinnon in that regard.

The testimony of Frank Rubinstein, the Foster Securities appraiser, given during the course of the SEC investigation only confirms that there was no concealment of any relevant fact. Thus, not only was the Foster Securities appraiser not concerned with post-merger transactions, but he was aware, as the SEC's brief concedes, that in August 1974 negotiations regarding the FRB-Parklane lease had ceased, and he saw no reason for taking it into account in his appraisal (Ds' br. 39-42).

In sum, the record shows that the Proxy Statement was a good faith effort to disclose. There simply is no support for the claim made by the SEC of any inference of a likelihood of future violations of the federal securities laws or that the injunctive relief which it seeks would in any way be proper.

- A. The SEC failed to demonstrate a reasonable likelihood of recurrence of violations of the federal securities laws.

The SEC, in seeking injunctive relief had, but failed to carry, the burden of proving a reasonable likelihood that defendants will violate the federal securities laws in the future. SEC v. Bausch & Lomb, Inc., 420 F. Supp. 1226 (S.D.N.Y. 1976); SEC v. Franklin Atlas Corp., 171 F. Supp. 711 (S.D.N.Y. 1959). This is a heavy burden, requiring probability, not mere possibility. SEC v. Koracorp Industries, Inc., [1975-76 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 95,532 (N.D. Cal. 1976).

It has been held repeatedly that the SEC cannot obtain injunctive relief, even in the case of a knowing violation of the federal securities laws, where there is no reasonable likelihood of recurrence. SEC v. National Student Marketing Corp., 360 F. Supp. 284 (D.D.C. 1973); SEC v. Franklin Atlas Corp., supra; see also United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953).

Here, it appears that the SEC is improperly seeking an injunction to punish past, rather than to prevent future, violations, though an injunction for such a purpose is completely out of order. SEC v. Bausch & Lomb, Inc., supra; see also Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944).

Similarly, the SEC erroneously contends that an injunction should lie purely on the basis of a finding of a violation. However, even a finding of a violation, without more, does not justify injunctive relief. SEC v. Management Dynamics, Inc., 515 F.2d 801, 807 (2d Cir. 1975).

The main thrust of the SEC's brief (p. 17) is its mistaken reliance upon SEC v. Universal Major Industries Corp., 546 F.2d 1044 (2d Cir. 1976), in an effort to argue that the Court below ignored certain pertinent factors in denying injunctive relief. In that case it was seen that among the considerations to be weighed in determining the propriety of injunctive relief are (a) the degree of scienter involved, (b) the sincerity of the assurances against future violations, (c) the isolated nature of the infraction, (d) a defendant's recognition of the wrongful nature of his conduct and (e) the likelihood, because of a defendant's professional occupation, that future violations might occur. 546 F.2d at 1048.

It is clear from the Opinion below that the District Court here did, in fact, consider these factors in denying an injunction. The District Court found that the knowing violations were an "isolated occurrence" (A26) and accepted Somekh's assurances that he had never intended, and did not intend, to violate any of the federal securities laws (A443, 605). It also determined that, because of

Somekh's professional occupation as the head of a private retail company, there was no likelihood of future violations. In this regard, the Opinion below noted (a) that Somekh was not a securities broker or dealer and (b) that apart from his role in Parklane, Somekh's only involvement with the securities market had been as an investor (A26).*

With respect to Parklane, the absence of any likelihood of recurrence is also apparent. Parklane has been a private company since the merger was effected in October 1974 -- a merger in respect of which Parklane quite properly sought and acted upon the advice of Parklane's independent certified public accountants, Clarence Rainess & Co. and Parklane's general counsel, Kaye, Scholer, Fierman, Hays & Handler (Ds' br. 10). SEC v. Harwyn Industries Corp., 326 F. Supp. 943 (S.D.N.Y. 1971); see also, SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082 (2d Cir. 1972).

The SEC also erroneously contends (SEC br. 18-19) that a likelihood of recurrent violations arises from the mere fact that Somekh and Parklane sought to defend themselves against the SEC's allegations of wrongdoing. However, such an inference would unjustly require an innocent defendant to choose between admitting the SEC's charges or

*The SEC's brief finds unclear "the significance of the Court's observation that Somekh is not a securities broker or dealer" (SEC's br. 28) and questions whether the isolated nature of an infraction is a factor entitled to some weight (SEC's br. 31). Its untenable posture in this regard is particularly incomprehensible in view of its express reliance upon the factors which are enumerated in SEC v. Universal Major Industries Corp., supra, 546 F.2d at 1048.

facing the imposition of a permanent injunction, and would unconscionably penalize the innocent defendant for exercising the basic right to defend himself.

In this regard the SEC's brief is again beside the point. It attempts to establish such an inference here by relying upon inapposite cases in which defendants had blatantly violated the federal securities laws to such a degree that their assertions of innocence were found to be insincere (SEC br. 18n.11). That is not the case here. Parklane and Somekh properly and in good faith have defended themselves against the SEC's challenge to the good faith disclosures made in the Proxy Statement. As has been seen in defendants' main brief and in this brief, there was no reason for them to acquiesce in the SEC's erroneous claims.

B. An injunction is drastic relief and should not be granted here since it would serve no remedial purpose.

The SEC further contends that, even if the violations here did constitute an "isolated occurrence", with no reasonable likelihood of recurrence, an injunction should nevertheless be granted because an injunction is "mild relief" (SEC br. 31-32). This unrealistic argument flies in the teeth of numerous authorities. Contrary to the SEC's contention, an injunction in an SEC action is a drastic

remedy and should be issued only in extraordinary situations. SEC v. Bausch & Lomb, supra; SEC v. Koracorp Industries, Inc., supra; SEC v. Franklin Atlas Corp., supra.

It could hardly be said that the SEC really thinks that such an injunction is needed here. The SEC did not commence this action until more than a year and a half after Parklane had become a private company and had issued the Proxy Statement challenged in this action (A451). Now that two and an half years have elapsed, it is even more apparent how unnecessary an injunction would have been. As the District Court properly found (A24), the SEC's delay in seeking injunctive relief was significant and belied any need for that extraordinary remedy. See SEC v. Franklin Atlas Corp., supra; SEC v. Koracorp Industries, Inc., supra.

Furthermore, it has been recognized that, where an injunction sought by the SEC would serve no purpose other than to stigmatize a defendant, an injunction should be denied. SEC v. Koracorp Industries, Inc., supra; see also SEC v. Pearson, supra. Clearly, the stigma of an injunction cannot, under any circumstances, be considered "mild" and should not be granted where, as has been seen here, it would serve no remedial purpose.

C. The District Court properly exercised its discretion in denying injunctive relief.

In determining whether to grant or deny injunctive

relief, the District Court has broad discretion. Chris-Craft Industries, Inc. v. Piper Aircraft Corp. [SEC v. Bangor Punta Corp.], 480 F.2d 341, 393-95 (2d Cir.), cert. denied, 414 U.S. 924 (1973); SEC v. National Student Marketing, supra; see also Hecht Co. v. Bowles, supra. The standard for review of a District Court's denial is whether the District Court has abused its discretion. Chris-Craft Industries, Inc. v. Piper Aircraft Corp. [SEC v. Bangor-Punta Corp.], supra. And no such abuse has been shown here.

The SEC, relying upon NMU v. Commerce Tanker Corp., 457 F.2d 1127 (2d Cir. 1972), has suggested that the standard for review should be a lesser one where, as here, the appeal is from the denial, rather than from the grant, of injunctive relief (SEC br. 25 n.21). Judge Mansfield, concurring in Chris-Craft Industries, supra, 480 F.2d at 405, specifically rejected that contention. NMU was decided under the National Labor Relations Act, which sets different standards for the grant of injunctive relief and, therefore, has no application here. See also SEC v. American Realty Trust, supra, [1976-77 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 95,913 (E.D. Va. 1977) (dictum).

As the SEC's brief concedes, "it carries a heavy burden when it attempts to overturn a determination regarding the proper scope of relief" (SEC br. 2). The weight of

that burden is readily seen in the failure of the SEC to cite even a single case in which a District Court has been reversed for denying injunctive relief even where it found a knowing violation of the federal securities laws.

Conclusion

No showing has been made by the SEC of any reasonable likelihood of future violations by Parklane or Somekh or that the injunction sought by the SEC would serve any remedial purpose. It is respectfully submitted that the District Court properly denied the injunctive relief sought by the SEC and, therefore, its denial of such relief should be affirmed.

Respectfully submitted,

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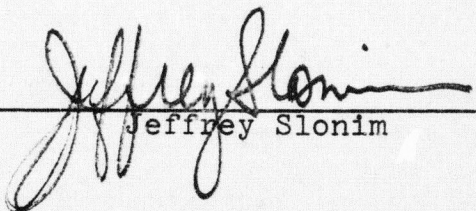
STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JEFFREY SLONIM, being duly sworn, deposes and
says:

That he is not a party to the action, is over 18
years of age, and resides at 2815 Coyle Street, Brooklyn,
New York; and that on the 16th day of May, 1977, deponent
served the annexed Answering Brief upon

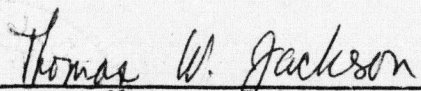
HARVEY L. PITT
General Counsel
Securities and Exchange Commission
 at
500 North Capitol Street
Washington, D.C. 20549

the address designated by said attorney for that purpose, by
depositing two true copies of the same enclosed in a postpaid
properly addressed wrapper in an official depository under
the exclusive care and custody of the United States postal
service within the State of New York.



Jeffrey Slonim

Sworn to before me this
16th day of May, 1977.



Notary Public
THOMAS W. JACKSON
Notary Public, State of New York
No. 24-1938664
Qualified in Kings County
Commission Expires March 30, 1979